

WN-16J

Ms. Ada Deer  
2537 Mutchler Road  
Madison, WI 53711

Dear Ms. Deer:

I am writing in response to your letter of December 15, 2016 to Administrator Gina McCarthy. That letter enclosed your request that U.S. Environmental Protection Agency enter into a programmatic agreement with the State of Michigan and the Menominee Nation, pursuant to Section 106 of the National Historic Preservation Act (NHPA), regarding consultation and coordination to consider impacts to cultural and natural resources from the proposed Aquila Resources Back Forty Project. EPA does not have the authority to enter into such an agreement.

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. As currently proposed, the Back Forty Project requires no federal undertaking because all of the permit decisions for the project required by federal law are the responsibility of the State of Michigan under federally approved state authorities covering the National Pollutant Discharge Elimination System (NPDES) permit program (Section 402 of the Clean Water Act (CWA), 33 U.S.C. 1342), the wetlands/dredge and fill permit program (Section 404 of the CWA, 33 U.S.C. 1344), and Title 1 of the Clean Air Act (42 U.S.C. 7475). While EPA retains federal oversight responsibilities for these approved state programs, including reviewing draft permits, the final permit decisions made under these authorities are state decisions and thus they are not subject to NHPA review.

In addition to the State of Michigan's authority to issue permits under federally approved state authorities, Michigan also maintains state authority to issue mining permits under Part 632 of its Natural Resources and Environmental Protection Act. Such permits are not subject to federal oversight.

While there is no basis for EPA to enter into an agreement with the State and Tribe pursuant to Section 106 of the NHPA, we note that the Michigan Department of Environmental Quality (MDEQ) has acknowledged the importance of the project area to tribal members. MDEQ and the State Archeologist met with the Menominee Tribe to discuss the Tribe's concerns, and agreed to include reasonable permit conditions that would protect identified cultural resources.<sup>1</sup> The State subsequently required Aquila Resources to undertake a cultural resources impact study

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<sup>1</sup> MDEQ's response to comments received on the Part 632 permit.

of the proposed mine site. Aquila Resources submitted reports entitled “Archaeological Investigations of the Aquila Resources Inc., Back Forty Project Area, Menominee County, Michigan” and “Phase I Archaeological Resources Survey for the Back Forty Project – Private Land North, Menominee County, Michigan” (Environmental Impact Assessment Volume II-H, Appendix F, in the Part 632 Permit Application). As a result of these studies, mine features have been located so as to avoid cultural resources identified, and permit conditions were added to the proposed Part 632 permit to further minimize impacts to cultural resources. These conditions are enclosed. The complete permit may be viewed at:

[http://www.michigan.gov/documents/deq/deq-oogm-mining-AquilaBackFortyPermit12282016\\_546947\\_7.pdf](http://www.michigan.gov/documents/deq/deq-oogm-mining-AquilaBackFortyPermit12282016_546947_7.pdf).

Additional information regarding MDEQ’s approach to consulting with tribal governments and specific tribal coordination regarding the Back Forty Project is discussed in a January 19, 2017 letter from C. Heidi Grether, Director, MDEQ, to Joan Delabreau, Chairwoman, Menominee Indian Tribe of Wisconsin. A copy of the letter is enclosed.

We appreciate the concerns you raised in your letter and have forwarded these to the State of Michigan for further consideration and coordination. Please do not hesitate to contact me or Peter Swenson of my staff if you have further questions.

Sincerely,

Christopher Korleski  
Director, Water Division

Enclosures

Enclosure

Conditions Related to Cultural and Archaeological resources  
Aquila Resources Back Forty Mine  
Part 632 Mining Permit, Special Permit Conditions: A. General, Parts 2 and 3

2. The permittee shall immediately suspend relevant mining activities, and shall promptly notify the OOGM Upper Peninsula District Geologist, in the event that any materials of possible archaeological, historic, or cultural value are unearthed by mining activities, and the permittee shall implement the Unanticipated Discovery Plan. If a qualified archaeologist determines that materials discovered are in fact cultural, the permittee shall notify the State Archeologist. In the event that pre-contact cultural materials are discovered, the permittee or the State Archaeologist will notify appropriate tribal groups
3. If work must proceed near the area of an unanticipated discovery of cultural resources or human remains before the disposition of the discovery is final, care must be taken to avoid disturbing the area in which the discovery was made. Further, the activity shall be monitored by a qualified archaeologist until the disposition of the discovery is resolved.